Office - Supreme Court, U.S.
FILED
MAR 11 1953
HAROLD B. WILLEY, Clerk

1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 653.

LONDON & LANCASHIRE INSURANCE COMPANY, LTD., A CORPORATION, PETITIONER,

VS.

GAS SERVICE COMPANY, A CORPORATION, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FLAVIUS B. FREEMAN,
Woodruff Building,
Springfield, Missouri,
Attorney for Petitioner.

ROBERT E. SEILER,
SEILER, BLANCHARD & VAN FLEET,
803 Joplin National Bank Building,
Joplin, Missouri,
Of Counsel.

SUBJECT INDEX

Petition for Writ of Certiorari 1

I. Summary and Short Statement of the Matter Involved 2

II. Basis of Jurisdiction 10

A. Statutes and Rules 10

B. Cases Believed to Sustain Jurisdiction 10

III. Questions Presented 12

IV. Reasons Relied On for Allowance of the Writ 13

A. The court below, by its interpretation of the rules governing the furnishing of gas service, which affect thousands of customers served by defendant in western Missouri, has reached a result on an important question of local law in conflict with the Missouri decisions governing the liability of a distributor of gas, and has followed a method or theory of construction in conflict with the general rules of construction adopted by this court and the Missouri Supreme Court, thereby committing error apparent on the face of the opinion 13

B. The court below has improperly deprived petitioner of its right to trial by jury by declaring that petitioner is barred by contributory negligence as a matter of law based on the rules as erroneously construed and despite reasonable testimony to the contrary on the facts, and in this respect has further committed error apparent on the face of the opinion 23

C. The court below has determined the issue of causation in conflict with applicable Missouri decisions 26

V. Conclusion 29

Table of Authorities Cited

CASES

Bird v. *United States*, 187 U. S. 118, 23 S. Ct. 42, 47 L. Ed. 100, 103 11

Erie R. Co. v. *Tompkins*, 304 U. S. 78, 58 S. Ct. 817, 82 L. Ed. 1194 15

Fidelity Union Trust Co. v. *Field*, 311 U. S. 169, 61 S. Ct. 176, 85 L. Ed. 109, rehearing denied 311 U. S. 730, 61 S. Ct. 438, 85 L. Ed. 475 ..... 12, 15

Golden v. *National Utilities Co.*, 356 Mo. 84, 201 S. W. 2d 292, 296-297 ..... 11, 13

Midland Realty Company v. *Kansas City Power & Light Company*, 300 U. S. 109, 57 S. Ct. 345, 81 L. Ed. 540, 544 ..... 11, 21

Miller v. *County of St. Clair County*, 8 How. 569, 12 L. Ed. 1201, 1206-1207 11

Postal S. S. Corp. v. *Steamship El Esleo*, 308 U. S. 378, 60 S. Ct. 332, 84 L. Ed. 335 ..... 12, 19-20

Seago v. *New York Cent. R. Co.*, 315 U. S. 781, 62 S. Ct. 806, 86 L. Ed. 1188 ..... 12, 23

Six Companies of California v. *Joint Highway District*, 311 U. S. 180, 61 S. Ct. 186, 85 L. Ed. 114, rehearing denied 311 U. S. 730, 61 S. Ct. 438, 85 L. Ed. 475 ..... 12, 15

Smith v. *Mabrey*, 348 Mo. 644, 154 S. W. 2d 770 ..... 11, 27

Southern Railway Co. v. *Walters*, 284 U. S. 190, 52 S. Ct. 58, 76 L. Ed. 239 ..... 12, 26

State ex rel. McAllister v. *Dunn*, 277 Mo. 38, 209 S. W. 110, 112 ..... 11, 17

State ex rel. Kansas City Power & Light Company v. *Public Service Commission*, 310 Mo. 313, 275 S. W. 940, 946 ..... 11, 21

State ex rel. St. Louis County Gas Service v. *Public Service Commission*, (Mo. Sup.) 286 S. W. 84, 85-86 11, 20

State ex rel. Western Union Telegraph Co. v. *Public Service Commission*, 304 Mo. 505, 264 S. W. 669, 671-672 ..... 11, 21

Stone v. *New York, C., & St. L. R. Co.*, ... U. S. ....., 73 S. Ct. 358, 97 L. Ed. 304 ..... 12, 23
Sunshine Anthracite Coal Co. v. *Adkins*, 310 U. S. 381, 60 S. Ct. 907, 84 L. Ed. 1263, 1270 11
Sweeney v. *United Feature Syndicate*, (2 Cir., 1942) 129 F. 2d 904, 905-906 25
Tennant v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520 ..... 12, 26
United States v. *Powers*, 307 U. S. 214, 59 S. Ct. 805, 83 L. Ed. 1245, 1249 ..... 11, 17
West v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 139 ..... 12, 15
Wilkerson v. *McCarthy*, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497 ..... 12, 23
Williams v. *Powers*, (6 Cir., 1943) 135 F. 2d 153, 156 25

STATUTES, RULES AND REGULATIONS

Section 386.020, R. S. Mo., 1949 16
Section 393.130, R. S. Mo., 1949 16
Section 393.140 (11), R. S. Mo., 1949 ..... 10, 15-16, 21
Title 28, United States Code, Section 1254 10
Rules of Decision Act, 28 U. S. C. A., Sec. 1652 14
Supreme Court Rule 38 (5) 10
Rule 25, Rule 32 and Rule 41, Governing, Furnishing of Gas Service, Missouri Public Service Commission, Effective May 1, 1939 ..... 2-3, 6, 18

OTHER AUTHORITIES

Jurisdiction of the Supreme Court of the United States, 1951 Edition, Robertson and Kirkham, Wolfson and Kurland, Sec. 334, p. 662; Sec. 316, p. 604, note 7 22
Moore's Federal Practice, Vol. 5, Sec. 51.04, p. 2505 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. _____.

LONDON & LANCASHIRE INSURANCE COMPANY, LTD., A CORPORATION, PETITIONER,

VS.

GAS SERVICE COMPANY, A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, London & Lancashire Insurance Company, Ltd., a corporation, respectfully shows as grounds for the issuance of a writ of certiorari to the United States Court of Appeals for the Eighth Circuit:

I.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

This action for damages is based on the admitted failure of defendant gas company to comply with the rules and regulations filed as required by law with the Missouri Public Service Commission governing the furnishing of gas service, as result of which gas leaked into the basement of a house and exploded. Jurisdiction is based on diversity of citizenship and amount in controversy. It is conceded that plaintiff, having paid its assignors (the owners of the dwelling) under their policy of extended coverage insurance, the full amount of the damage done by defendant's negligence, is subrogated to all rights of the owners. Plaintiff's complaint (R. 1-4) was based upon the failure of defendant to inspect the service line between its gas main in the street and the meter placed near the residence as required by the following rules on file with the Missouri Public Service Commission (R. 2-3, 15-16):

> Rule (25). Where gas service pipes from the curb line to the meter are not installed by the company, the work is to be done by a competent and fully qualified plumber. Upon completion of service lines so installed, an air pressure test of five pounds per square inch is to be placed upon the pipes and connections up to and including the meter cock, and the pressure test is to be deemed satisfactory if this pressure is held without perceptible loss for a period of fifteen minutes. This test is to be * * * witnessed by a representative of the company * * * the company reserving the right to refuse to connect to its main any service pipes not passing inspection.
>
> Rule (32). All parts of a gas supply system up to and including the meter connections, when installed

> by a gas fitter or plumber on the premises of a prospective customer shall be reported to and inspected by the company * * * before it is connected with the main or service pipe which contains unmeasured gas.

Defendant admitted that the above rules had been filed and published with the Missouri Public Service Commission as required by law and were in force and effect at the time of the explosion (R. 5, par. 4 of answer, admitting portions of par. 4 of complaint, R. 2).[1]

The dwelling house in question was a newly constructed, not yet occupied residence (R. 13, Exhibit D). The service line (from which the gas leaked) was some 35 to 40 feet in length, running north and south from the south curb of 15th street (an east and west street) to the meter at the foot of the house (R. 11, R. 12, Exhibit C), laid in a ditch, covered with dirt, and the leak was at a point about 70 inches north of the basement wall, where the pipe was about 10 inches deep in the ground (R. 9, R. 11, Exhibit B) and at a point where the escaping gas was still the property of defendant, not yet having been metered. On the morning of the explosion, October 28, 1948, defendant's meter fitter installed the meter at a point next to the house (R. 11, R. 12, Exhibit C) and turned the gas on at the curb cock permitting unmeasured gas from the street main on 15th street to pass into the service line (R. 24). The meter fitter was on the premises some 8 to 12 minutes after turning on the gas and the explosion occurred within

---

[1]These rules governed the service in the furnishing of gas to the city of Joplin and thirty-five other cities and communities over the entire half of western Missouri. At the time in question (1948) defendant, according to the records of the Missouri Public Service Commission, had approximately 55,831 customers in these thirty-six cities and communities receiving service under these rules, and has at least that many at the present time.

5 to 10 minutes after he departed (R. 11, 24). At the time the meter fitter turned the unmeasured gas into the service line, the line was buried in the ground and only by an air pressure test could the leak have been detected (R. 10, interrogatory 61). There was no evidence as to when the leak shown in Exhibit B (R. 11) came into existence, but it was undisputed that the leak was present when the meter man turned on the unmeasured gas and could have been detected had an air pressure test been made by defendant at that time. The rapidly escaping gas followed the line of least resistance along the loose earth in the trench in which the service line was laid into the basement of the unoccupied residence, where the explosion occurred. By interrogatories (R. 9, 10), defendant admitted that it made no test, examination or inspection of any kind of the service line before turning its unmeasured gas into it from the street main, although equipment for making such tests on the service line was available to defendant and if it had made such tests before turning on the gas the leak would have been discovered and it would not have turned the gas on. On this point, the trial court stated (R. 36):

> "The only inference from the evidence is that defendant knew there had been no compliance with its Rules and Regulations at the time it connected the service pipe to its main and unmeasured gas was turned therein. Had it performed the duty it assumed under said Rules and Regulations, the whole evidence is that it would have discovered the leak in the service line."

The evidence showed that it had been the practice over the years in the city of Joplin with respect to the construction of new dwellings for the Joplin city plumbing inspector not to make any pressure tests for leaks in the service line between the curb and the meter, but to make such tests for leaks in the gas lines inside the house (known

as house lines) (R. 13, 14, 15, 19) and this practice was a matter of common knowledge among the plumbing and gas trade in Joplin (R. 19). Plaintiff's witness Moore, a former city plumbing inspector, testified that defendant's superintendent told him that the gas company would check the service line and the plumbing inspector could check the house lines (R. 14). Defendant's superintendent admitted that he endeavored to conduct operations as superintendent in compliance with the company's rules and regulations on file with the Missouri Public Service Commission (R. 15, 23).

Despite the foregoing undisputed evidence, the trial court refused to direct a verdict for the plaintiff (R. 24, 33, 34) and also, over objection (R. 26, 34, 35), after refusing to direct a verdict, refused to submit to the jury, as requested by plaintiff (R. 25, 26) the issue of whether failure by defendant to comply with its rules in the respects complained of amounted to failure to use ordinary care in furnishing gas service and if defendant was thereby negligent, whether such negligence proximately caused the explosion. Plaintiff appealed from the ruling of the court in the above respects (R. 37, 38).

The Court of Appeals affirmed the trial court, January 6, 1953, reported in 200 F. 2d 783, by a divided court and printed in full herein (R. 41-54). The majority opinion, while stating that the sole question is whether the rules of the Missouri Public Service Commission were effective to change the Missouri common law rule of liability of a distributor of gas (R. 42-43) does not cite any Missouri decisions on the subject, and does not decide the question, but does decide that the rules require interpretation or construction. The majority opinion then holds that

rule (41), which was not an issue in the trial below,[2] required the property owner to maintain the gas installation in proper operating condition, so that even if the rules do have the force and effect of law, the effect of rule (41) is to require a concurrent or overlapping duty on the part of the property owner, whereby the property owner is barred by being guilty of contributory negligence as a matter of law in any case where the explosion is due to a leak in the service line (R. 47-48).

While the majority opinion does not discuss causation, it necessarily follows that the court regarded the assumed failure of the property owner to comply with rule 41 to be the proximate cause of the explosion. No Missouri decisions are cited in support of such holding.

Although rule (41) was pleaded in defendant's answer, it was not an issue at the trial, as is seen by the fact that the trial court submitted the case to the jury on the issue of whether or not defendant knew, or by the exercise of ordinary care should have known that a break existed in the service line after defendant turned the gas on (R. 28). Had rule 41 been considered by the trial court to have the effect given it by the construction made by the Court of Appeals, there would have been no issue whatever to submit to the jury, because the property owners in failing to maintain the service line against leaks in it would have

---

[2]Rule (41) provides as follows (R. 7):

"(41) The piping and connection owned by the customer, or on the customer's premises, including the customer's service line, shall be of sufficient size to afford adequate service and shall be maintained in safe, efficient and proper operating conditions by and at the expense of the customer.

In the interest of the public, the company shall have the right to inspect all new service lines, and may refuse service until the foregoing provision has been complied with, or if test reveals excessive loss of gas through leakage on customer's premises. * * *"

been in violation of rule 41 and guilty of contributory negligence as a matter of law irrespective of whether defendant did or did not know of the leak. Such construction of rule 41, adopted in the majority opinion of the Court of Appeals, which is in direct conflict with the Missouri decisions on the liability of a distributor of gas, was not asserted by either side at the trial and was mentioned for the first time by the trial court in its memorandum in passing on after trial motions of plaintiff. No Missouri decisions are cited either in the Court of Appeals or by the trial court in support of such holding. The majority opinion likewise ignores the reservation by the gas company in rule 41 of the right of inspection and refusal of service.

The majority opinion also justifies the decision of the trial court by declaring as a matter of law that the evidence showed that the service line was not constructed of first class material (R. 48).

The minority opinion says that under the rules the gas company modified its common law liability by holding out that the customer could rely upon any new service pipes not being put to use without knowing that the tests on same were satisfactory (R. 50), and that the majority was in error in construing rule 41 to impose a concurrent and overlapping duty on the customer for two reasons: First, the construction of the rules adopted by the Court of Appeals makes them devoid of any practical and legal content, a construction which should not be made, unless compelled, of such rules any more than if it were construction of a statute or contract; further, that the duty to make a preliminary inspection of the service line before put to use is not an overlap of a duty to maintain the service line in condition while in use, that the pipes did not constitute a service line until used to carry gas and the gas company was not entitled to make such use of the pipes

until it had carried out its duty of testing for leaks and not until the pipes were in use as a service line would the customer's duty of maintenance under rule 41 begin (R. 51). Second, the minority view gives practical meaning and legal significance to rules 25, 32 and 41, the effect being to modify the Missouri common law duty of the gas company by imposing on it the duty to have an initial air pressure made for possible leakage in new installations before putting the pipe to use as a service line, while preserving unaffected the customer's duty to maintain the service line *after* it is so placed in use (R. 51-52).

The minority opinion also points out that the court cannot declare, as a matter of law, that the materials actually used in the construction of the line, although shown in evidence to have been approved by the city plumbing inspector, were not "first class material" and so in violation of the rules (R. 52).

The minority opinion points out that the court overlooks the fact that the gas company turned on the gas without first causing a pressure test to be made of the line, which was a duty the gas company owed under the rules even if construction had been of first class material and even if a report had been made to the gas company before the pipes were concealed, that the gas company had no right to turn the gas into the service line without first inspecting merely because the fact of installation of the lines had not been reported to the gas company before the lines were concealed and that the actions of the gas company constituted a waiver of its right of insisting on an earlier personal inspection (R. 53).

In conclusion, the minority opinion states that no matter what had previously been done or not done, the *immediate proximate cause* of the explosion was the turning on of the gas into the service line without the gas com-

pany's first having had the pressure test made; that the judgment should be reversed and the cause remanded, it being left to the trial court to resolve as a matter of Missouri law whether the violation of the rules was negligence *per se* or merely evidence of negligence to be found as a fact (R. 53-54).

The judgment of the Court of Appeals sustaining the judgment of the trial court in refusing to direct a verdict for petitioner, or failing that, to instruct the jury on the admitted violation by defendant of its rules as constituting at least evidence of negligence on which a verdict could be returned against defendant, is a final decision as to said issue and denies petitioner any rights to relief against defendant for violation by defendant of the rules filed with the Missouri Public Service Commission governing the furnishing of gas service to plaintiff's assignors and thousands of other customers in western Missouri. The issue is whether a federal court may so deprive petitioner of its rights governed by the Missouri law and decisions, by holding that petitioner is barred by contributory negligence as a matter of law, by adopting a construction of rules filed under a Missouri statute in conflict with the general rules of construction adopted by this court and the Missouri courts, by reaching a result which is in conflict with the Missouri decisions governing the liability of a distributor of gas, by holding that petitioner is barred by contributory negligence as a matter of law, and by determining the matter of causation in conflict with the applicable Missouri decisions.

II.

BASIS OF JURISDICTION.

A. Statutes and Rules.

The judgment of the Court of Appeals was entered January 6, 1953 (R. 54). By appropriate order (R. 55), later extended to March 13, 1953, the mandate of the Court of Appeals was stayed to permit the filing of this petition.

The jurisdiction of this court is urged under Title 28, United States Code, Section 1254, approved June 25, 1948, and under the following portions of Supreme Court Rule 38, Section 5:

> "* * * The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> "* * * * * * *
>
> "(b) Where a circuit court of appeals has * * * decided an important question of local law in a way probably in conflict with applicable local decisions * * * or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

B. Cases Believed to Sustain Jurisdiction.

The case turns on construction placed by the Court of Appeals on certain rules governing the furnishing of gas service to thousands of customers in western Missouri, filed by defendant as required by Missouri statute (Section 393.140 (11), R. S. Mo., 1949) with the Missouri Public Service Commission. In the result reached, the Court of Appeals has decided the case in conflict with the Missouri decisions declaring the liability of a distributor of

gas (*Golden* v. *National Utilities Co.*, 356 Mo. 84, 201 S. W. 2d 292, 296-297), has adopted a theory or approach of construction of said rules in conflict with the rules of construction adopted by this court and the Missouri Supreme Court (*Miller* v. *County of St. Clair County*, 8 How. 569, 12 L. Ed. 1201, 1206-1207; *Bird* v. *United States*, 187 U. S. 118, 23 S. Ct. 42, 47 L. Ed. 100, 103; *United States* v. *Powers*, 307 U. S. 214, 59 S. Ct. 805, 83 L. Ed. 1245, 1249; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 60 S. Ct. 907, 84 L. Ed. 1263, 1270; *State ex rel. McAllister* v. *Dunn*, 277 Mo. 38, 209 S. W. 110, 112), and in conflict with the decisions of this court and of the Missouri Supreme Court as to the effect of said rules (*Midland Realty Co.* v. *Kansas City Power & Light Co.*, 300 U. S. 109, 57 S. Ct. 345, 81 L. Ed. 540, 544; *State ex rel. St. Louis County Gas Service* v. *Public Service Commission*, (Mo. Sup.) 286 S. W. 84, 85-86; *State ex rel. Western Union Telegraph Co.* v. *Public Service Commission*, 304 Mo. 505, 264 S. W. 669, 671-672; *State ex rel. Kansas City Power & Light Company* v. *Public Service Commission*, 310 Mo. 313, 275 S. W. 940, 946), has improperly deprived petitioner of its right to trial by jury and has improperly declared petitioner barred by contributory negligence as a matter of law despite conflicting evidence to the contrary, and has decided a question of causation concerning the gas explosion in question in conflict with the Missouri decisions on the subject (*Smith* v. *Mabry*, 340 Mo. 644, 154 S. W. 2d 770).

Among the cases believed to sustain jurisdiction under such circumstances on the grounds that the Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision are the following:

On the matter of proper construction of the rules: *Postal S. S. Corp.* v. *Steamship El Isleo,* 308 U. S. 378, 60 S. Ct. 332, 84 L. Ed. 335.

On the matter of conflict with applicable local decisions: *West* v. *American Telephone & Telegraph Co.,* 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 139; *Fidelity Union Trust Co.* v. *Field,* 311 U. S. 169, 61 S. Ct. 176, 85 L. Ed. 109; *Six Companies of California* v. *Joint Highway District,* 311 U. S. 180, 61 S. Ct. 186, 85 L. Ed. 114, rehearing denied 311 U. S. 730, 61 S. Ct. 438, 85 L. Ed. 475.

On the matter of preserving petitioner's right to trial by jury: *Stone* v. *New York, C., and St. L. R. Co.,* ___ U. S. ___, 73 S. Ct. 358, 97 L. Ed. 304; *Wilkerson* v. *McCarthy,* 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497; *Seago* v. *New York Cent. R. Co.,* 315 U. S. 781, 62 S. Ct. 806, 86 L. Ed. 1188.

On the matter of causation: *Tennant* v. *Peoria & P. U. Ry. Co.,* 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520; *Southern Railway Co.* v. *Walters,* 284 U. S. 190, 52 S. Ct. 58, 76 L. Ed. 239.

III.

QUESTIONS PRESENTED.

Where petitioner relies upon an admitted violation by defendant of rules filed as required by state law with the Missouri Public Service Commission and where the Missouri Supreme Court has previously held that other filings made with said Public Service Commission under the same statutes as here involved have the force and effect of law, shall a federal court be permitted to deprive petitioner of any and all rights against defendant for violation of said rules:

A. By reaching a result which is in conflict with the Missouri decisions governing the liability of a distributor

of gas and by interpreting or constructing such rules in conflict with the general rules of construction followed by this court and the Missouri Supreme Court?

B. By declaring that petitioner is barred by contributory negligence as a matter of law based on the rules as erroneously construed and despite reasonable testimony to the contrary on the facts?

C. By determining the issue of causation in conflict with the applicable Missouri decisions?

IV.

REASONS FOR ALLOWANCE OF THE WRIT.

A. The Court Below, by Its Interpretation of the Rules Governing the Furnishing of Gas Service, Which Directly Affect Thousands of Customers Served by Defendant in Western Missouri, Has Reached a Result on an Important Question of Local Law in Conflict with the Missouri Decisions Governing the Liability of a Distributor of Gas, and Has Followed a Method or Theory of Construction of Such Rules in Conflict with the General Rules of Construction Adopted by This Court and the Missouri Supreme Court, Thereby Committing Error Apparent on the Face of the Opinion.

So far as liability is concerned for an explosion resulting from a leak in the customer's service line, the Missouri common law rule is that the gas company is liable where it has actual or constructive notice of the defective condition and is guilty of negligence in failing to repair the pipe or shut off the gas. *Golden* v. *National Utilities Co.*, 356 Mo. 84, 201 S. W. 2d 292, 296-297.

The decision of the court below in the case at bar is squarely in conflict with the above decision of the highest court in Missouri, because under the present decision rule

41 imposes on the customer a concurrent and overlapping duty to maintain the service line in safe, efficient and proper operating condition at the same instant that the gas company is required under its other rules to inspect the service line against leaks. In every case, therefore, where there is an escape of gas from a leak in the service line, there can be no recovery by the customer, irrespective of whether the gas company had knowledge of the leak and failed to take proper action, because at all times, under the interpretation placed by the court of appeals on rule 41, the customer was under a concurrent and overlapping duty to maintain the service line in safe condition against leaks, and, hence, the customer is barred by contributory negligence as a matter of law. The effect of the decision of the court below is to allow the defendant, by its own rule, to create effectively an area of "no liability" so far as leaks in service lines owned by the customers are concerned. This is an absurd result, but it is the logical conclusion of the decision below. There is no evidence as to what caused the break in the service line here, but assume that the line as installed was in perfect condition and remained so until some third party, 30 minutes before the explosion, broke the line and that the owners had no opportunity to discover the fact. Under the decision below, the owners could not recover, regardless of what violation of duty there may have been by defendant when the gas was connected, because under rule 41, as interpreted by the court below, the owners would be guilty of contributory negligence as a matter of law. Such a decision is obviously in conflict with the applicable local decisions on the subject.[3]

---

[3]This court has granted certiorari in cases where the case is in the federal courts only by reason of diversity of citizenship. Under the Rules of Decision Act, 28 U. S. C. A., Sec. 1652, and

The court of appeals reached such erroneous conclusion by applying to the rules a theory or approach of construction, which as stated in the dissent (R. 51) "makes the obligation of the gas company under the regulations devoid of any practical and legal content" and is "a construction which, unless compelled, is no more entitled to be made of such regulations than of contracts or statutes." The interpretation of the majority opinion, so far as liability for gas explosions is concerned, effectively cancels out the rules so far as the company's duties on one hand and the customer's duties on the other are concerned. This means that the legislature, in giving the Public Service Commission power to require the filing of rules governing service, was doing a vain and useless thing. An examination of the Missouri statutes establishing the Public Service Commission and prescribing its powers and jurisdiction shows a very broad control over utilities was placed in the Commission. For example, Section 393.140 (11), R. S., 1949 (formerly Section 5656 (12), R. S., 1939), concerning the general powers of the Commission in respect to gas, water and electricity, and under the provisions of which these rules were filed, provides:

Erie R. Co. v. *Tompkins*, 304 U. S. 78, 58 S. Ct. 817, 82 L. Ed. 1194, there is not to be within a state "two divergent or conflicting systems of law, one to be applied in the state courts, the other to be availed of in the federal courts, only in case of diversity of citizenship." *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 139. "It is inadmissible that there should be one rule of state law for litigants in the state courts and another rule for litigants who bring the same question before the federal courts owing to the circumstance of diversity of citizenship." *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169, 61 S. Ct. 176, 85 L. Ed. 109, rehearing denied 311 U. S. 730, 61 S. Ct. 438, 85 L. Ed. 475. See, also, *Six Companies of California* v. *Joint Highway District*, 311 U. S. 180, 61 S. Ct. 186, 85 L. Ed. 114, rehearing denied 311 U. S. 730, 61 S. Ct. 438, 85 L. Ed. 475.

> "The Commission shall: * * * 11. Have power to require every gas corporation * * * to file with the commission and to print and keep open to public inspection * * * all rules and regulations relating to * * * services used or to be used. * * * Unless the commission otherwise orders, no change shall be made in * * * any rule or regulation relating to any * * * service * * * which shall have been filed and published by a gas corporation * * * in compliance with an order or decision of the commission, except after thirty days' notice to the commission and publication for thirty days as required by order of the commission. * * *"

Section 386.020, R. S., 1949 (formerly Section 5578, R. S., 1939), on "Definitions" states as follows:

> "26. The term 'service,' when used in this chapter, is used in its broadest and most inclusive sense * * *."

And Section 393.130, R. S., 1949 (formerly Section 5645, R. S., 1939), dealing with regulation of gas companies, provides:

> "1. Every gas corporation * * * shall furnish and provide such service instrumentalities and facilities as shall be safe and adequate * * *."

Presumably the legislature had some useful purpose in giving the Public Service Commission the power to require the filing of rules governing services used or to be used, and presumably the rules filed by the defendant governing the furnishing of gas service in some thirty six communities in western Missouri, controlling thousands of customers, likewise had some useful purpose. To construe them, if possible, toward such end is the accepted rule of construction of this court and the Missouri Supreme Court.

> "* * * only two general principles need be invoked in construing the acts of 1819 and 1821, which

> are * * *. Second, if the grant admits of two interpretations, one of which is more extended and the other more restricted, so that a choice is fairly open and either may be adopted without any violation of the apparent objects of the grant, if, in such case, one interpretation would render the grant inoperative, and the other would give it force and effect, the latter, if within a reasonable construction of the terms employed, should be adopted." *Miller* v. *County of St. Clair County,* 8 How. 569, 12 L. Ed. 1201, 1206-1207.
>
> "There is a presumption against a construction which would render a statute ineffective or inefficient or which would cause grave public injury or even inconvenience." *Bird* v. *United States,* 187 U. S. 118, 23 S. Ct. 42, 47 L. Ed. 100, 103.

Accord: *United States* v. *Powers,* 307 U. S. 214, 59 S. Ct. 805, 83 L. Ed. 1245, 1249; *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, 60 S. Ct. 907, 84 L. Ed. 1263, 1270.

The general rule is the same in Missouri. *State ex rel. McAllister* v. *Dunn,* 277 Mo. 38, 209 S. W. 110, 112, where the court construed a Missouri statute providing that certain named officials should not be eligible to the office of county treasurer, saying:

> "It is a well-settled rule that the Legislature is not to be held to have done a vain and useless thing * * *. It seems clear that unless the Legislature meant that a collector was incapable of being chosen treasurer it enacted a useless statute * * *. That the Legislature intended to accomplish something is not an unreasonable conclusion. That the statute should be construed to effect this, if on its face it is open to two reasonable constructions, is settled law * * *. Relator's construction explains the enactment of the law. Respondent's construction leaves it without reasonable basis and opens the way for practices which none can defend."

Under the construction placed on the rules by the court below there is no liability on the gas company either with or without the rules. But if these rules are construed in accord with the general rules of construction adopted by this court and the Missouri Supreme Court, then, as so clearly pointed out by the minority opinion (R. 51, 52) the rules serve some useful purpose. Further, the construction placed on the rules by the minority opinion is consistent with the practicalities of the situation between the ordinary gas customer and the gas company at the time when the gas is turned on for the first time. In the usual case of a new residence, the gas is not turned on until the occupants are about ready to move in. By this time the plumbers who actually laid the service line weeks earlier have long since gone. The service line is buried under the ground. The customer could arrange for a plumber to be on hand at the precise moment when the gas company turns on the gas, but this would require special arrangements and is not consistent with the facts ordinarily existing in daily experience when the gas company gets around to turning on the gas. On the other hand, it is consistent with the situation usually existing with respect to a new dwelling for the gas company to make the final inspection so clearly required by its rules before it turns on the gas, which is the active element whereby disastrous results can occur if there is a leak in the line.

We respectfully point out that rule 32, formulated by the defendant itself, reading as follows:

> "All parts of a gas supply system up to and including the meter connections, when installed by a gas fitter or plumber on the premises of a prospective customer shall be * * * inspected by the company before * * * it is connected with the main or service pipe which contained unmeasured gas."

requires a final inspection by the gas company before "unmeasured gas" (which is the kind involved here) is turned on, which final inspection admittedly the gas company failed to make. The reason for requiring such final inspection is obvious. It is common knowledge that there is generally a considerable lapse of time (just as there was in this case) between the time the service line is first covered up and the time of the actual connection between the service line and the street main. During that time, while the construction continues on the residence, trucks, bulldozers, and other heavy equipment customarily used in present day building, are very likely to pass over portions of the yard where the service line is buried. Regardless of how carefully the original installation may have been made, the service line may well have been damaged by the time the residence is ready for occupancy. By requiring a final test under rule 32, before turning on the unmeasured gas, defendant obviously was intending to provide a final check against the possibility of the service line having been damaged while the house was being completed. By filing such a rule defendant recognized such possibility and that it was in the best position to make the test which so clearly should be made by someone to avoid exactly what happened in the present case. The rule obviously was accepted by the Public Service Commission for such purpose and allowed to go into force and effect. Yet by interpreting rule 41 to provide an overlapping and concurrent duty on the part of the customer (although no such construction is impelled) the court of appeals has, for all practical purposes, completely nullified rule 32 and reduced the filing of the rules to a useless formality.[4]

---

[4]The court has granted certiorari in a case involving the question of the proper construction of rules, in a situation somewhat analogous to the case at bar. *Postal S. S. Corp.* v. *Steam-*

This is further illustrated by the fact that the Missouri Supreme Court has previously ruled that other filings made with the Public Service Commission under exactly the same statutes as those here relied upon by petitioner acquire the force and effect of law. *State ex rel. St. Louis County Gas Service* v. *Public Service Commission,* (Mo. Sup.) 286 S. W. 84, l. c. 85-86, as follows:

> "* * * The applicatory law is found in subdivision 12 of said Section 10478 (now Section 393.140, *supra*). * * * A schedule of rates and charges filed and published in accordance with the foregoing provisions acquires the force and effect of law; and as such it is binding upon both the corporation filing it and the pub-

---

ship El Isleo, 308 U. S. 378, 60 S. Ct. 332, 84 L. Ed. 335. The court of appeals, in a libel where the two steamers were on crossing courses had ruled that it must disregard certain Rules of the Supervising Inspectors, which were purported to have been adopted under authority of The Articles of Inland Rules established by Congress. Petitioner claimed that the Inspectors' rules were not inconsistent with the statute and had the force of law, and the only question was as to the validity of the Inspectors' requirements. The court held (84 L. Ed. l. c. 340):

> "We hold these rules are not essentially inconsistent with the statute and are valid, both the statutory provisions and the Inspectors' rules being designed to promote safety in situations fraught with danger. * * * As the Court of Appeals apparently did not consider the conduct of El Isleo in the light of the Inspectors' requirements, but thought under the compulsion of its former decision, that it must disregard those requirements, we think that the cause should be returned to the Court of Appeals to be decided by it, free of that compulsion."

Thus, the present case turns on the proper interpretation or application to be given rules which previous decisions of this court and the Missouri Supreme Court, as shown *infra,* are generally to be considered as having the force and effect of law, and where, in this instance, by the opinion of the court below, said rules have been so interpreted and applied as to deprive them of any practical force and effect.

> lic which it serves. It may be modified or changed only by a new or supplementary schedule, filed voluntarily, or by order of the commission. Such is the construction which has been universally put upon analogous provisions of the Interstate Commerce act * * * and we have so ruled with respect to similar provisions of our Public Service Commission Law relating to telegraph companies. * * *"

Accord: *State ex rel. Western Union Telegraph Company* v. *Public Service Commission*, 304 Mo. 505, 264 S. W. 669, 671-672; *State ex rel. Kansas City Power & Light Company* v. *Public Service Commission*, 310 Mo. 313, 275 S. W. 940, 946.

This court, in dealing with the same statute as here involved, stated in *Midland Realty Company* v. *Kansas City Power & Light Company*, 300 U. S. 109, 57 S. Ct. 345, 81 L. Ed. 540, 544:

> "It is clear that, as against those specified in the contract here involved, the rates first filed by plaintiff and those promulgated by the commission in accordance with the statute, have the same force and effect as if directly prescribed by the legislature."

It is true that the authorities cited with respect to effect of filings made with the Missouri Public Service Commission under the statutes here involved are cases relating to rates or other charges, rather than filings of rules governing service. But there is no sound reason to draw any distinction between the effect of the two. Section 393.140, *supra*, refers in the same clause to "all rates and charges" and "all rules and regulations relating to rates, charges or service." In the next sentence, it refers to "No change shall be made in any rate or charge" and also to "any rule or regulation relating to any rate, charge or service." Since the effect which schedules of rates have

as being law rests entirely on the above statute, there is no sound reason why a rule or regulation concerning service should not have the same effect, when it is considered that both rates and service are part of the same clause in the statute.

These cases show that this court and the Missouri Supreme Court considered that the legislature had some useful purpose in authorizing the Public Service Commission to require that gas companies make filings of rules and regulations relating to rates, charges or service. By the interpretation placed by the court below on the rules governing furnishing of gas service in the present case, that purpose is frustrated, the rules are declared to cancel themselves, the defendant's liability is no different with or without the rules, the defendant by its own rules is permitted to create an area of "no liability" with respect to leaks in service lines, and the court below reaches a result clearly in conflict with the decisions of the Missouri courts on the liability of a distributor of gas. We respectfully submit that the opinion of the court below is erroneous on its face, that the situation calls for the exercise of this court's power of supervision[5] and that the court below has decided an important question of local law in a way in conflict with applicable local decisions.

---

[5]"Nevertheless, more frequently than is generally supposed, the writ of certiorari issues simply because the decision of the court below is wrong. At every term of Court, certiorari is granted in a handful of cases not involving any conflict of decisions, not presenting any novel problem or principles, not resulting in any important precedents, and involving parties and issues not at all in the public eye." Jurisdiction of the Supreme Court of the United States, 1951 edition, Robertson and Kirkham, Wolfson and Kurland, Sec. 334, p. 662. The same authors, at note 7, page 604, state: "A particularly well informed commentator has recently stated his belief that * * * the apparent incorrectness of a decision below is more frequently than in the past a ground for granting certiorari. See Frank, The United States Supreme Court: 1947-48 (1948), 16 U. Chi. L. Rev. 1, 34-35; Frank, The United States Supreme Court: 1948-49 (1949), 17 U. Chi. L. Rev. 1, 38-39. * * *"

B. The Court Below Has Improperly Deprived Petitioner of Its Right to Trial by Jury by Declaring That Petitioner Is Barred by Contributory Negligence As a Matter of Law Based on the Rules As Erroneously Construed and Despite Reasonable Testimony to the Contrary on the Facts, and in This Respect Has Further Committed Error Apparent on the Face of the Opinion.

Petitioner, on the undisputed facts, under the Missouri law was entitled either to a directed verdict or to a submission to the jury of the negligence issue based on defendant's admitted violation of the rules. It is important to preserve to litigants their right to a jury trial and in the Federal Employers' Liability Act cases the court has granted certiorari where such has been the effect. *Seago* v. *New York Cent. R. Co.*, 315 U. S. 781, 62 S. Ct. 806, 86 L. Ed. 1188; *Wilkerson* v. *McCarthy*, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497; *Stone* v. *New York C. & St. L. R. Co.*, ___ U. S. ___, 73 S. Ct. 358, 97 L. Ed. 304. It is just as important to the integrity of the judicial system for a federal court in applying state law, as in the present case, to preserve the right of trial by jury as it is for the state courts in applying federal remedies.

The court below does not declare the effect of the rules relied upon in the present case, but says that if said rules have the force and effect of law as claimed by petitioner, then petitioner is barred by contributory negligence as a matter of law. This, however, is based on the erroneous construction placed on the rules by the court, particularly on rule 41, as pointed out in IV, A, *supra*. It is further based on an erroneous consideration of proximate cause, as pointed out in IV, C, *infra*.

At one place in the opinion below, the court (R. 48) virtually declares that petitioner's assignors were guilty of contributory negligence as a matter of law because gas

escaped from a substandard connection, which connection was in violation of the "first class material" provisions of the rules. But as the dissenting opinion points out (R. 52), the evidence showed (R. 18) that this connection had been approved by the city plumbing inspector because of war scarcities. This is the sort of situation where reasonable men could differ as to whether or not this constituted contributory negligence.

The majority opinion also seeks to uphold the trial court by stating in the opinion (R. 48) that the record does not show that petitioner objected to the refusal to submit to the jury the question of negligence of the gas company for its claimed failure to comply with its regulations. But, as shown below, the record is clear that the trial judge understood petitioner's position, which is all that is required.

> "The rule does not require formality and it is not important in what form an objection is made or even that a formal objection is made at all, as long as it is clear that the trial judge understood the party's position; the purpose of the rule is to inform the trial judge of possible errors so that he may have an opportunity to correct them." Moore's Federal Practice, Vol. 5, Sec. 51.04, p. 2505.

The instruction in question was offered and refused at R. 25. At R. 26, in the charge to the jury, the trial court stated that "With reference to other issues raised and presented by the pleadings, the Court is declaring they have not been proved according to law, and therefore they will not be submitted to you." At R. 34 and 35, in the Memorandum and Order on Plaintiff's Motion for Judgment Notwithstanding Verdict, the trial court makes it plain that in the pretrial order it was ruled that the negligence of defendant in failing to inspect the pipes in accordance

with its rules would be submitted to the jury, but that when the requests for charges were submitted in chambers, the court decided that such issue would not be submitted, stating the reasons, and also stating that with reference to the legal effect of the rules relied upon "The varying contentions of the parties relative to that matter was then clearly, but not decisively, presented to the Court." The trial court goes on to say (R. 35) that it was made plain that the refusal to submit the issue as to the rules of the defendant was not an indication that the issue was not in the case, but that the court would consider such issue on motion for judgment notwithstanding the verdict, if a verdict was returned against plaintiff on the sole issue submitted to the jury—that issue being whether or not defendant's meter man should have heard or smelled the escaping gas before he left the premises (R. 28).

We believe, therefore, that it is too plain for argument that the trial court clearly understood the position of petitioner with reference to the requested instruction, and the failure to make a formal exception to the refusal to instruct is of no importance under the circumstances. *Williams* v. *Powers*, (6 Cir., 1943) 135 F. 2d 153, 156; *Sweeney* v. *United Feature Syndicate*, (2 Cir., 1942) 129 F. 2d 904, 905-906.

The majority opinion also criticizes said instruction for ignoring the duty imposed by the rules on the property owners (R. 48). But such duties, if material to the issues, would be in the nature of defensive matters, to be covered by instructions offered by the defendant, and would not be essential to a valid instruction authorizing a verdict for plaintiff.

The court below declines to pass on whether or not the rules relied upon by petitioner have the force and effect of law. But the court then proceeds to dispose of the

case as if the rules did have the force and effect of law, saying that *if* they do, petitioner is barred *as a matter of law* by contributory negligence. If the court is unable to decide whether or not the rules have the force and effect of law, it should not bar petitioner on the theory that if they did have such effect, that petitioner would then be guilty of contributory negligence as a matter of law. It was petitioner's theory throughout the litigation that if the rules did not have such effect (or if it was doubtful), then plaintiff was entitled to submit to the jury the matter of whether or not the failure of the defendant to make the inspections referred to in the rules amounted to negligence. It will be noted that the refused instruction (R. 26) required the jury to find that "such failure on the part of the defendant amounted to failure to use ordinary care in furnishing its gas service and that defendant was thereby negligent."

As the dissenting opinion points out, this cause cannot properly be decided except by determining, not evading, the matter of the effect of the rules relied upon. If they have the force and effect of law, then petitioner is entitled to a directed verdict, for the reasons pointed out in IV, *supra*. If they do not (and the court below does not decide this issue one way or the other), then clearly petitioner is entitled to submit to the jury the question of the effect of defendant's failure to abide by its rules.

C. The Court Below Has Determined the Issue of Causation in Conflict with Applicable Missouri Decisions.

In *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520, certiorari was granted because of the important question of petitioner's right to a jury determination of the issue of causation. In *Southern Railway Co.* v. *Walters*, 284 U. S. 190, 52 S. Ct. 58, 76 L. Ed. 239,

the court makes no statement as to why it granted certiorari, but, in addition to deciding that there was no substantial evidence on which to submit the issue to the jury of whether the train stopped before crossing the street as required by an order of the Illinois Commerce Commission, also ruled on the issue of proximate cause, holding that there was proof that the negligence claimed was the proximate cause of the injury.

In the instant case, the court below has not only interpreted the rules to require plaintiff's assignors to maintain the service line against leaks at the very instant that defendant was first putting it to use for that purpose, but has ruled, in effect, by declaring that plaintiff's assignors were guilty of contributory negligence, that such failure on part of plaintiff's assignors was the proximate cause of the explosion. This ruling ignores the fact that there was no danger from the condition until defendant turned on the gas and that defendant, so to speak, under the circumstances, had the last clear chance to have avoided the explosion by testing the line as required by its rules before turning the unmeasured gas loose therein. As stated in IV, A., *supra*, the ruling is even broad enough to bar recovery in a case where the leak in the line was caused by some third party, even maliciously and entirely unknown to the property owner. But, as the dissenting opinion states (R. 53-54):

> "* * * no matter what had previously been done or not been done, the immediate proximate cause of the explosion was the turning on of gas into the service line without having had the leakage test made."

This is very plainly shown by the decision of the Missouri Supreme Court in *Smith* v. *Mabrey*, 348 Mo. 644, 154 S. W. 2d 770, where plaintiff's claim was that the city

of Cape Girardeau was negligent in failing to maintain a reasonably safe sidewalk on the west side of a certain street, which forced the plaintiff, a seven year old child, to attempt to cross the street to reach the sidewalk on the other side, at which time she was struck by an automobile driven by the co-defendant. The Missouri court held that even if the city was negligent, such negligence was not the proximate cause of the accident, saying as follows at 154 S. W. 2d l. c. 771, 772:

> "We are of the opinion that the alleged negligence of the city had no direct connection with the collision and think that such negligence was only incidental. In 45 C. J. 931, Sec. 491, we read the following: 'A prior and remote cause cannot be made the basis of an action if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible, if there intervened between such prior or remote cause and the injury a distinct, successive, unrelated and efficient cause of the injury, even though such injury would not have happened but for such condition or occasion. If no danger existed in the condition except because of the independent cause, such condition was not the proximate cause.' "

We submit that the above language fits the present case precisely and that under the Missouri law even if the court below was correct in its construction of the duties imposed by the rules, nevertheless any failure on the part of petitioner's assignors to comply with said rules was not the proximate cause of the explosion, nor even a concurring proximate cause, and in this respect the court below has further committed error apparent on the face of the opinion.

CONCLUSION.

Wherefore, your petitioner prays that a writ of certiorari issue to the Circuit Court of Appeals for the Eighth Circuit to the end that the errors aforesaid may be corrected by this court and the judgment of said Court of Appeals reversed, and that your petitioner may have such other and further relief in the premises as to this court may seem just.

Respectfully submitted,

FLAVIUS B. FREEMAN,
Woodruff Building,
Springfield, Missouri,
Attorney for Petitioner.

ROBERT E. SEILER,
SEILER, BLANCHARD & VAN FLEET,
803 Joplin National Bank Building,
Joplin, Missouri,
Of Counsel.

Office - Supreme Court, U. S.
FILED
APR 8 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 653.

LONDON AND LANCASHIRE INSURANCE COMPANY, LTD., A CORPORATION, PETITIONER,

VS.

THE GAS SERVICE COMPANY, A CORPORATION, RESPONDENT.

RESPONDENT'S BRIEF.

JEROME T. DUGGAN,
700 Scarritt Building,
Kansas City 13, Missouri,
E. P. DWYER, JR.,
A. E. SPENCER, JR.,
416 Joplin National Bank Building,
Joplin, Missouri,
Attorneys for Respondent.

TABLE OF CONTENTS

Statement under Rules 27 (4) and 38 (3) 1

Argument—

Point I. The assignors of petitioner were the owners of the service pipe in question at all times and under the laws of Missouri were obligated to properly maintain and inspect 4

Point II. No evidence of violation of the Rules and Regulations filed by respondent was introduced in the Record 7

Conclusion 11

Table of Cases

Barrickman vs. National Utilities Co., (Mo. App., 1945) 191 S. W. 2d 265 6

Brauer vs. St. Louis County Gas Co., (Mo. App., 1922) 238 S. W. 519 6

Gas Service Co. vs. Helmers, 179 F. 2d 101 ..... 6, 9

Gas Service Co. vs. London & Lancashire Ins. Co., 188 F. 2d 404 5

Gas Service Co. vs. Payton, 180 F. 2d 505 6

Golden vs. National Utilities Co., 356 Mo. 84, 201 S. W. 2d 292 6

Hanson vs. City Light and Traction Co., 238 Mo. App. 182, 178 S. W. 2d 804 6

Nomath Hotel Co. vs. Kansas City Gas Co., 204 Mo. App. 214, 223 S. W. 975; second opinion, 300 Mo. 240, 253 S. W. 975 ..... 5, 6

Sipple vs. Laclede Gaslight Co., 125 Mo. App. 81, 102 S. W. 608 6

Skelly Oil Co. vs. Holloway, 171 F. 2d 670 5

State ex rel. Kansas City Power & Light Co. vs. Public Service Commission of Missouri, 310 Mo. 313, 275 S. W. 940 ..... 8, 9

Other Authorities

38 C. J. S. 735, Section 42-d 4

Missouri Revised Statutes, 1949, Section 393.140 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 653.

LONDON AND LANCASHIRE INSURANCE COMPANY, LTD., A CORPORATION, PETITIONER,

VS.

THE GAS SERVICE COMPANY, A CORPORATION, RESPONDENT.

RESPONDENT'S BRIEF.

STATEMENT UNDER RULES 27 (4) AND 38 (3).

Petitioner, in its Summary and Statement, has deleted material parts of Rules 25 and 32. The latter part of Rule 25 should read (R. 16):

> "This test is to be made by the plumber installing the gas service line and witnessed by a representative of the company. Gas services are to be constructed of new and first class material, installed in a workmanlike manner, properly protected and graded, the com-

pany reserving the right to refuse to connect to its main any service pipes not passing inspection."

Petitioner has also deleted from Rule 32 (R. 16) the phrase, "before it is concealed" relative to the obligation of the plumber making the installation to report same to the gas company.

Respondent's Rule 41 (R. 7-46) provided:

"(41) The piping and connection owned by the customer, or on the customer's premises, including the customer's service line, shall be of sufficient size to afford adequate service and shall be maintained in safe, efficient and proper operating conditions by and at the expense of the customer.

"In the interest of the public, the company shall have the right to inspect all new service lines, and may refuse service until the foregoing provision has been complied with, or if test reveals excessive loss of gas through leakage on customer's premises. The company shall also have the right to discontinue service and remove the service connections at the main if this provision be not complied with at all times."

Article 50, Section 626, of the Code of the City of Joplin contained the provision (R. 6):

"* * * Every job of gas piping must be reported to the Chief Plumbing Inspector as soon as roughed in, and it must show no leakage under a ten-pound pressure on a spring or mercury gauge at the discretion of the Chief Plumbing Inspector, for fifteen minutes. This test must be made by the Chief Plumbing Inspector, and no job of gas fitting shall be concealed nor connected to a gas supply system until a certificate of inspection has been issued for the same by the Chief Plumbing Inspector. * * *"

Respondent's Exhibit 1 (R. 18) was issued by the then City Plumbing Inspector, pursuant to the City Code (R.

rvice line in September when it
noticed the sub-standard bush-
sed it because of scarcity of ma-

17), who inspected the servi
was in an open ditch and nc
ing and coupling but passed
terial (R. 18).

r of petitioner, on October 25,
it to install its meter at the resi-
)), this being respondent's first

Nina Morris, assignor c
1948, requested respondent to
dence in question (R. 10),

pursuant to the provisions of
R. 21), which provided in part:

notice of the connection, p
respondent's Exhibit 3 (R.

reby represent that the *service*
ances into which gas is to be de-
erty and have been properly in-
for the reception of gas and will
me" (Emphasis supplied).

> "* * * and I hereb
> *lines*, pipes and applianc
> livered are my property
> spected, are suitable for
> be so maintained by me

testified (R. 23) that respond-
hrough his office; that customers
ice at the downtown office, which
artment and that the meter was
to him by the City Plumbing In-
r to Exhibit 1. Thus a connect
over to the meter setter until
supplied with a copy of respond-
pondent's Exhibit 1 (R. 23). It
ice line from the curb cock up to

Witness Schumacher tes
ent's Exhibit 1 cleared throu
made application for service
was relayed to his departm
installed upon delivery to hi
spector of a card similar to
order was never turned ov
witness' department was sup
ent's Exhibit 3 and respond
was the customer's service li
the meter.

ARGUMENT.

I.

The Assignors of Petitioner Were the Owners of the Service Pipe in Question at All Times and under the Laws of Missouri Were Obligated to Properly Maintain and Inspect.

There was no controversy that assignors of petitioner were the owners of the service pipe in question. The Missouri courts have repeatedly held that the owners of such pipes owe the duty to properly install and maintain same and that no duty arises upon a gas distributing company to inspect such pipes and appliances not owned by it unless put upon notice of some defect therein and proof of negligence upon the distributor's part following such notice.

In 38 C. J. S., page 735, Section 42-d, the rule is stated:

> "Accordingly, the rule has been laid down that, in the absence of any fact on which to base an inference of duty, the failure of a gas company on introducing gas into a dwelling on application, to inspect pipes or fixtures which were placed therein by the owner and over which the company has no control, is not negligence. The company is warranted in assuming that the interior system of pipes is sufficiently secure to permit the gas to be introduced with safety, and is not liable for injuries caused by leaks therein of which it had no knowledge. To render the company liable in such cases there must be facts alleged to show notice of defects, or facts from which an inference of duty to inspect arises either from contract, custom or franchise. * * *"

The court submitted the issue of notice to respondent to a jury, which resolved that issue in favor of respondent.

The Missouri courts have consistently held that absent such notice respondent would owe no duty to make an inspection of the pipes owned and maintained by the assignors of petitioner. This would especially be true in view of the fact that assignors had warranted the system to be sound in their application, defendant's Exhibit 3 (R. 21), and had caused defendant's Exhibit 1 (R. 18) to be issued by the City Plumbing Inspector and delivered to respondent.

The Missouri rule is stated in *Nomath Hotel Co.* v. *Kansas City Gas Co.*, 204 Mo. App. 214, 223 S. W. 975; second opinion, 300 Mo. 240, 253 S. W. 975.

The Missouri cases sustaining this position are summarized by the Eighth Circuit Court of Appeals in its first opinion in this case, *Gas Service Co.* v. *London & Lancashire Ins. Co.*, 188 F. 2d 404, where the court, l. c. 409, quoting from *Skelly Oil Co.* v. *Holloway*, 171 F. 2d 670, states:

> "* * * Under the laws of Missouri, in the absence of a contract so requiring, a distributor of gas is not charged with the duty of inspecting or maintaining privately owned service pipes or appliances in the buildings or on the property of its customers. On receipt of notice from a customer of defects in the customer's service installations, the gas distributor may discharge the duty which the law imposes upon it by shutting off the supply of gas until such time as the owner of the defective pipes or appliances may have corrected the defects in them. * * *"

The court then discusses the obligation of a distributor who undertakes to inspect or correct leaks or other defects on the owner's premises and in support of the Missouri rule

cites *Barrickman* v. *National Utilities Co.*, (Mo. App.) 191 S. W. 2d 265; *Hanson* v. *City Light and Traction Company*, 238 Mo. App. 182, 178 S. W. 2d 804; *Sipple* v. *Laclede Gaslight Co.*, 125 Mo. App. 81, 102 S. W. 608; *Nomath Hotel Co.* v. *Kansas City Gas Co.*, 300 Mo. 240, 253 S. W. 975; and *Brauer* v. *St. Louis County Gas Co.*, (Mo. App.) 238 S. W. 519.

In the cases of *Gas Service Co.* v. *Helmers*, 179 F. 2d 101; *Gas Service Co.* v. *Payton*, 180 F. 2d 505; and *Golden* v. *National Utilities Co.*, 356 Mo. 84, 201 S. W. 2d 292, this rule was affirmed, although in each instance the distributing company was held liable on the ground that it had notice of the defective condition of the service pipe and was guilty of negligence in failing, after notice, to either repair or cut off the supply of gas.

All the evidence relative to notice to respondent in this case pertains to the question of whether the meterman of respondent could have heard the escaping gas while he was upon the premises of petitioner's assignors. This issue was, by the jury resolved against petitioner. Absent such notice, the Missouri courts uniformly hold that no duty or obligation rests upon a distributor of gas to inspect the service pipes installed and owned by the customer.

We submit that the decision of the Court of Appeals was not in conflict with the rulings of the appellate courts of Missouri and that each of the cases cited by petitioner is determined upon actual or constructive notice on the part of the distributor of the defects in the customer's service pipes or appliances.

II.

No Evidence of Violation of the Rules and Regulations Filed by Respondent Was Introduced in the Record.

Respondent filed with the Missouri Public Service Commission certain Rules and Regulations, pursuant to Missouri Revised Statutes, 1949, Section 393.140, and according to the testimony of witness Schumacher (R. 15), the respondent conducted its operations in compliance with such Rules and Regulations.

The Record contains no evidence of violation by respondent of such Rules and Regulations.

Rule 25 requires that an air pressure test *be made by the plumber installing the service line* for the customer and that same shall be witnessed by a representative of the company. The Rule further provides that all such service lines shall be constructed of new and first class material, installed in a workmanlike manner, properly protected and graded, and reserves to the company the right to refuse to connect to its mains any service pipes not so installed and passing inspection. There was no evidence introduced that an air pressure test was made by the plumber installing the gas service line. From the verbiage, it is clear that the obligation to make the test rested upon the plumber and certainly could not have been witnessed by a representative of respondent unless made.

There could be no merit to the argument of petitioner that both the provision of this Rule and of the City Code of Joplin could be waived by some agreement purported to have been made some six years prior to the explosion between a City Inspector and a superintendent of respondent.

Rule 32 provides that the installing plumber shall report installations to the company for its inspection before

same are concealed. The evidence indicates that the City Plumbing Inspector, Mr. Baggerly, inspected this line in September (R. 17) and required some changes therein, at which time he noticed the defective connection. The Record is clear that respondent received no notice relative to the installation prior to the request by assignor of petitioner on October 25, 1948 (three days prior to the explosion), that respondent install its meter and supply gas service. Petitioner's assignor had on file with respondent defendant's Exhibit 3 (R. 21), in which she warranted that she was the owner of the pipes and that same had been properly inspected and were suitable for the reception of gas and would be so maintained. She also caused the permit of the City Plumbing Inspector, defendant's Exhibit 1 (R. 18) to be issued and filed with respondent (R. 23), pursuant to Article 50, Section 626, of the Code of the City of Joplin (R. 6).

Rule 41 (R. 7-46) requires the customer to install a service line of sufficient size and to maintain same in a safe, efficient, and proper operating condition at the expense of the customer.

We submit that there is no evidence in the Record showing the violation by respondent of any duty imposed upon it by any of the foregoing Rules on file with the Public Service Commission, or Articles of the Code of the City of Joplin.

The Missouri Public Service Commission could not reasonably be contended to have jurisdiction to determine the character of installation made by a private citizen upon his property for the reception of service from a gas utility, regardless of its power to regulate the utility.

The Supreme Court of Missouri, in the case of *State ex rel. Kansas City Power & Light Co.* v. *Public Service*

Commission of Missouri, 310 Mo. 313, 275 S. W. 940, and the Eighth Circuit Court of Appeals in the case of *Gas Service Co.* v. *Helmers*, 179 F. 2d 101, held that where a conflict exists between the Rules filed with the Commission and the laws of Missouri that the laws of Missouri shall be controlling, the court stating in the latter opinion, l. c. 104, in reference to a Rule of this respondent:

> "Granting that the rule is a valid rule, the important question here pertains to its applicability to the circumstances of this case. *The law of Missouri is controlling, and where the law applies it is superior to the company's regulations, provided they are in conflict*" (Emphasis supplied).

The above Rules and Regulations are in strict conformity with the common law liability as established by the courts of Missouri that the owner of service and house pipes is obligated to properly install and maintain them and that no duty is imposed upon a distributor of gas to inspect such service pipes absent a showing of notice, either actual or constructive, upon its part of some defects therein.

We submit that there is no basis for petitioner's argument that the decision of the Eighth Circuit Court of Appeals is in conflict with the Missouri decisions, either as to the interpretation of the Missouri law or the construction of the Rules, as each case cited by petitioner is shown to be based upon actual or constructive notice on the part of the distributor of defects in the customer's pipes, and in each instance negligence is sustained on the basis of such notice.

The construction of the Rules made by the trial and appellate court was correct, as there is no evidence in the Record showing any violation of said Rules on behalf of

respondent. Assuming a violation of the Rules on behalf of respondent, there was no testimony in the Record as to compliance with the Rules on behalf of assignors of petitioner, either to properly install, inspect, or safely maintain the service line in question.

As found by the trial and appellate court, a violation of the Rules on behalf of each party would not justify a recovery on behalf of either. This would not result in the assumption made by petitioner that a customer would be prohibited from recovering regardless of knowledge of the leak on behalf of the distributor. The Rules do not purport to determine the liability of the distributing gas company but merely establish a method of operation in conformity with the law as determined by the courts of Missouri.

Either party failing in its duty would, of course, be liable under such Missouri law and the construction of the Rules by the appellate court is in strict conformity with the Missouri law, and the court's interpretation of the Rules did not establish any duty upon the customer other than to properly install and maintain the service line in question.

The contention of petitioner that respondent should be held liable for using the pipe warranted by the assignors of petitioner and the City Plumbing Inspector to be sound and in good condition, *where no duty was shown upon respondent to inspect said pipe, nor knowledge on its part of any defect therein, would, we submit, place upon respondent the burden of an insurer, which is directly contrary to the laws of Missouri.* Petitioner's requested instruction No. 4 (R. 25) clearly calls for such a conclusion and was properly overruled by the trial court.

CONCLUSION.

Wherefore, respondent respectfully requests this court to deny petitioner's application for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

JEROME T. DUGGAN,
700 Scarritt Building,
Kansas City 13, Missouri,
E. P. DWYER, JR.,
A. E. SPENCER, JR.,
416 Joplin National Bank Building,
Joplin, Missouri,
Attorneys for Respondent.